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BLEED THROUGH-

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 691

FEDERAL POWER COMMISSION, PETITIONER

v.

NIAGARA MOHAWK POWER CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit remanding, with instructions to modify, an order of the Commission issued September 27, 1950.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 585) is not yet reported; that of the Commission (R. 105) at 9 F. P. C. 228.

JURISDICTION

The order of the Court of Appeals was entered on December 31, 1952 (R. 614). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act and 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The respondent, the Niagara Mohawk Power Corporation, a licensee under Part I of the Federal Power Act,[1] paid two other companies for waterpower rights those companies claimed to possess under state law to the use of the water of the navigable Niagara River. The use of such water through the Niagara Falls project by the respondent was expressly authorized under a Federal Power Act license for that project. In computing the amortization reserve of the respondent required by Section 10 (d) of the Act (Appendix, pp. 32–33 *infra*), the Commission disallowed these payments for the waterpower rights. The Court of Appeals reversed, holding that the payments were legitimate project expenses and properly allowable in computing the amortization reserve of Section 10 (d).

[1] 16 U. S. C. 791a *et seq.* The Federal Water Power Act of 1920, as amended, is Part I of the present Federal Power Act.

The license was issued on March 2, 1921, to Niagara Falls Power Company, which merged with the respondent on October 19, 1950. Nothing in the case turns on the merger and, for convenience, "Company" is used to refer to the company holding the license.

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The questions presented are:

1. Are state laws authorizing waterpower use of a navigable stream and waterpower rights acquired thereunder superseded by the Federal Power Act and a license pursuant thereto granting Federal authority for the use of such stream for waterpower development?

2. Is a party licensed under the Federal Power Act to use the waters of a navigable stream through a hydroelectric project required to compensate another company for taking the latter's waterpower rights acquired under state law for power use of the same water?

3. Are payments by federally licensed companies, with express authorization to use certain waterpower, to owners of the alleged waterpower rights under state law properly allowable as legitimate operating expenses under the Federal Power Act?

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (41 Stat. 1063, 16 U. S. C. 791a, *et seq.*), and the River and Harbor Act of 1899 (30 Stat. 1121) are printed in the Appendix (*infra*, pp. 30–41).

STATEMENT

During the last two decades of the nineteenth century, the International Paper Company, certain parties termed the "Pettebone-Cataract interests," and others were granted certain lands and "waterpower rights" on the United States

side of the Niagara River above the Falls by private grant, letters patent from the State of New York and acts of the legislature of that state. These "waterpower rights" were exercised by diverting the water above the Falls, conducting it through an intake canal owned by a predecessor of the licensee Company, dropping it through tunnels for about 100 feet and discharging it from a cliff below the Falls into the River.

After passage of the River and Harbor Act of 1899 (30 Stat. 1121), prohibiting structures in navigable waters and impairment of navigable capacity without War Department permission, a predecessor of the licensee Company applied for and secured such permission in 1900, 1903, 1904, and 1905, respectively, to use the water for power purposes. Upon passage of the Burton Act of June 29, 1906 (34 Stat. 626), specifically prohibiting diversions from the Niagara River without War Department permission, and upon extensions of that Act with a similar requirement, the Company's predecessor secured further War Department permission to make the diversions.[2]

[2] The Burton Act, and extensions thereof approved March 3, 1909, August 22, 1911, April 5, 1912, January 19, 1917, June 30, 1917, June 29, 1918, and July 12, 1919, are printed at R. 416, 437, 452, 453, 457, 461, 465, and 468. The International Boundary Waters Treaty proclaimed May 13, 1910 (36 Stat. 2448, R. 438) permitted a diversion of 20,000 cubic feet per second (cfs) on the United States side. The War Department permits were issued August 16, 1907, September

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On March 2, 1921, a license authorizing the respondent company to divert water from the Niagara River for use in the development of power through the Niagara Falls plant (FPC Project No. 16),[3] was issued under the Federal Water Power Act. Pursuant to Section 10 (d) of the Act,[4] the license specifies six percent as a reasonable rate of return and provides that one-half of the earnings in excess thereof should, after 20 years of operation, be transferred to the amortization reserves required by that section. The amortization reserve is one of the deductions to be made from the original cost in determining the "net investment" in a project.

On September 27, 1950, in a proceeding pursuant to Section 10 (d) of the Act, the Commission found that the Company had earned $1,828,864.08 in excess of the six percent return from normal project operations for the period

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2, 1911, April 23, 1912, January 19, 1917, July 2, 1917, July 1, 1918, June 30, 1919, and July 30, 1919 (R. 436, 452, 454, 459, 462, 466, 467, and 469). None of these permits allowed a total diversion of more than 15,600 cfs.

[3] This plant develops the full head, 212 feet, instead of the 100 feet formerly developed.

[4] The pertinent part of Section 10 (d) provides:

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment * * *, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. * * *

from March 2, 1941 (20 years after the license was issued) to December 31, 1946. Accordingly, the Commission directed that one-half of this excess ($914,437.04) be placed in an amortization reserve as required by Section 10 (d) and the provisions of the license (R. 115–117). 9 F. P. C. 228. On appeal to the court below, the respondent claimed that the amount to be transferred to the amortization reserve was only $515,432.04. The $399,000 difference between the Commission and the Company represents one-half of $798,000, the amount by which the Commission adjusted the Company's operating expenses for the period involved. The disallowance of $798,000 is made up of two items.

1. Payments of $577,500 made by the Company to International Paper Company under a contract entered into in 1919, as subsequently adjusted in 1937, by which International Paper leased to the Company, at an annual rental of $99,000, its "water-power rights" to use 730 cubic feet per second (cfs) of water for power development which it had enjoyed since the 1890's under State law.[5]

[5] Cf. *International Paper Co.* v. *United States*, 282 U. S. 399. In that case, this Court held that when the Paper Company had an agreement with respondent's predecessor, itself a Federal licensee under the Act of June 29, 1906, 34 Stat. 626 (p. 407), to use certain amounts of water for power purposes, a diversion of that water in 1918 by the Secretary of War from the Power Company (and from the Paper Company) rendered the United States liable in damages to

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2. A concession amounting to $220,500, which the Commission found to result from the reduced electric rates which the Company charged Buffalo Niagara Electric Corporation (the Company's then parent) in exchange for other "waterpower rights" under State law. The Buffalo Niagara "waterpower rights" (derived from the "Pettebone-Cataract" interests) are said to have arisen toward the end of the last century for the use of 262.6 cfs of Niagara River water for power development. In 1925 the Company leased these State waterpower rights from Niagara, Lockport and Ontario Power Company, the then owner under State law, in return for a concession in the rates at which the Company would furnish electric power to Niagara Lockport. In 1945 Niagara Lockport was consolidated with another company to create Buffalo Niagara.

This refusal of the Commisison to recognize any charges by other parties for the use by the licensee Company of their State-created "waterpower rights" was held by the majority of the

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the Paper Company. As the Court held (p. 407), the Secretary of War made no attempt to revoke the license of the Power Company, and proceeded "on the footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish."

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court below (Kimbrough Stone, Miller, JJ.) to be improper.[6]

The basic principle underlying the decision of the lower court appears in connection with its distinction between a claim to ownership of running waters (which it said was not asserted here), and the right to use such waters temporarily, a usufructuary right long recognized. The court said (R. 607–608) that the Federal Power Act:

> is a purely regulatory measure. A federal license is not an original grant of authority, but a permission to use a state's grant of authority. To be sure, a license is a prerequisite in that water rights under state law in a navigable stream may not be exercised without one, as the Supreme Court held in the *New River* case [*United States* v. *Appalachian Power Company*, 311 U. S. 377 (1949)]. * * * But these considerations do not by any means require the conclusion that the Act and a license thereunder constitute the source from which all water rights flow. An applicant for a license must show the Commission he has under state law the right to divert the

[6] In 1947, the Commission denied a proposed amendment to the charter of the Company, which would have had the effect of recognizing the validity of the water rights of the Pettebone-Cataract interests and of the International Paper Company. *In the Matter of The Niagara Falls Power Company*, 6 F. P. C. 784 (R. 387). See also *Niagara Falls Power Company* v. *Federal Power Commission*, 137 F. 2d 787, 791, certiorari denied, 320 U. S. 792, rehearing denied, 320 U. S. 815.

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> water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him.

The court further concluded that an analysis of the statutory provisions of the Federal Power Act showed that Congress intended by that Act to give full weight to state ownership of waterpower rights in navigable waters as recognized by state law. Accordingly, since the lower court was of the view that these "waterpower rights" were valid usufructuary property rights under New York State law, it held that the payments of the Company pursuant to its contractual obligations should be allowed as project operating expenses.

Judge Bazelon dissented. He considered this Court's opinion in *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152, controlling. He read that opinion as holding that the Power Act stated a Congressional assertion of the dominant Federal authority over navigable waters. Hence by that Act Congress superseded all water rights affecting navigable waters except those expressly saved. Nothing in the Act, according to Judge Bazelon, operated to save the "waterpower rights" of the type here involved.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that Congress has not by the Federal Power Act and its predecessor statutes as-

serted its dominant authority over navigable waters of the United States insofar as concerns water-power development.

2. In holding that state laws authorizing water-power use of navigable streams and waterpower rights acquired thereunder are not superseded by the Federal Power Act and a license thereunder.

3. In holding that a Federal Power Act licensee, licensed to use the waters of a navigable stream through the project covered by the license, is also required to comply with state laws relating to the power use of such waters, and that the licensee is required to compensate other parties for taking their waterpower rights under state law, if the licensee uses the water covered by such state rights for power development under the license.

4. In holding that payments by the respondent company to others for their state waterpower rights were legitimate operating expenses for the purpose of computing the respondent's amortization reserve under Section 10 (d) of the Act.

REASONS FOR GRANTING THE WRIT

The court below has decided a basic and important question in the administration of the Federal Power Act—a question expressly left open by this Court in *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359, 373—in a manner which is inconsistent with the interpretation of

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the Act in prior decisions of this Court and which is in subtantial conflict with the reasoning of the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* v. *Federal Power Commn.*, 137 F. 2d 787, certiorari denied, 320 U. S. 792, rehearing denied, 320 U. S. 815.

1. (a) The narrow question in this case is whether, in computing the amortization reserve of a licensee under part I of the Federal Power Act, the Commission is forced to recognize, as valid operating expenses, payments made by the licensee for the use of waterpower rights which are allegedly owned by others under state law. Under Section 10 (d) of the Act, after 20 years of operation, one-half of the earnings of a licensee in excess of a reasonable return are to be transferred to the amortization reserve. This amortization reserve then serves to decrease the amount of the net investment of the licensee.

The net investment of a licensee is important in the administration of the Act for the following reasons:

(1) It determines the cost to the United States of the acquisition of the project under Section 14 of the Act (Appendix, pp. 33–34, *infra*), should the United States decide to take over the project at the end of the license period.

(2) It serves as the basis for the rental which the United States must pay for a project which is taken temporarily during

periods of national emergency. Sec. 16 (Appendix, pp. 34–35, *infra*).

(3) It serves as the basis for the price the United States shall pay for the project upon a court sale pursuant to Section 26 of the Act (Appendix, pp. 38–39, *infra*).

(4) It serves as the basis for the fixing by the Commission of reasonable rates to be charged by the licensee. Secs. 19 and 20 (Appendix, pp. 35–38, *infra*).

The questions presented by this Act will arise in every case where licensees treat as legitimate operating expenses payments made for waterpower rights claimed under state law. Further, if payments for state-conferred "waterpower rights" are legitimate project expenses, the principles applied by the court below would require the Commission to allow them as legitimate project costs under Section 4 (b) (Appendix, p. 31, *infra*) when made for outright purchase of such "rights." It is not possible at this time to say in how many instances similar payments, either as annual rental payments for the use of state-conferred waterpower rights or as outright purchases of such rights, are claimed as either project operating expenses or as project capital costs. However, the claims to such payments already submitted by licensees run into several millions of dollars and relate to a sizeable number of licensed projects. The increase in net investment in this case alone will amount to $399,000, plus the additional sums which must

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be allowed, if the judgment of the court below is not disturbed, in the years from 1946 until the end of the license on March 1, 1971.

(b) The broad question in this case goes to the basic theory of the Act. It presents the issue as to the extent to which the Federal Power Act has superseded state law. Under the decision below, an applicant for a Federal Power Act license to construct a waterpower project in a navigable stream must also pay for "rights" recognized by state law in order to use the water of the stream for power purposes. The decision of the court below is thus of importance to every licensee, which, in reliance upon the Federal Power Act authority and license, may have failed to meet the conditions imposed by the alleged possessors of state rights for the use of the power, to every prospective applicant for a license, to the consumer of power whose rates are based upon the licensee's operating costs, and to the United States, if and when it takes over or leases the project. Cf. *First Iowa Coop.* v. *Federal Power Commn.*, 328 U. S. 152.

2. The waterpower rights for which the payments in question were made were "owned" by private parties, who are not authorized or licensed under the Federal Power Act to possess such rights. The only basis for those rights claimed by these parties is that they are recognized under state law. This has the effect of requiring the United States to pay, at the termination of the

license period or during a temporary seizure, for waterpower rights—that is, the right to use the water in a navigable stream for power purposes—claimed by private parties. This result is completely at odds with the decisions of this Court which recognized as early as 1913 that the Federal Government has complete dominion over the waterpower of navigable streams. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69; see also *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 88. If there ever was any doubt as to the exclusive proprietary interest of the United States in a navigable stream (cf. *Ford & Son* v. *Little Falls Co.*, 280 U. S. 369), that doubt was resolved by this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, when it stated (pp. 424, 427):

> * * * The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or nonuse. The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable."
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> * * * * *
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> * * * It has been shown * * * that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined,

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> for the fast land; nothing for the water-power.

See also *New Jersey* v. *Sargent,* 269 U. S. 328, 337; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 596–597; *United States* v. *Commodore Park,* 324 U. S. 386, 390; *United States* v. *Willow River Power Co.,* 324 U. S. 499; *United States ex rel. Chapman* v. *Federal Power Commn.,* Nos. 28 and 29, this Term, decided March 16, 1953, slip opinion, pp. 16–17, dissent, pp. 1–2.

Despite these clear expressions that the complete ownership of the flow of a navigable stream is in the United States, the effect of the decision below is that in the Federal Power Act Congress intended to obligate the United States to pay for such state vested waterpower rights upon acquisition or rental of the project and to obligate the consumers of electric power to pay for such rights in their rates.

The court below held that in the Federal Water Power Act of 1920 Congress had not asserted its paramount authority over the navigable waters of the nation to the same extent as it had in the Act of March 3, 1909 (35 Stat. 815, 820). It attempted to distinguish *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, where, in a condemnation proceeding instituted by the United States under the Act of 1909, this Court held that that Act had extinguished all inferior rights

in the St. Marys River. Accordingly, the United States did not have to pay for the "flow of the stream." As this Court stated, "that the running water in a great navigable stream is capable of private ownership is inconceivable" (229 U. S. at 66, 69). The only relevant distinction between *Chandler-Dunbar* and this case is the fact that the two cases arose under different statutes. Yet nothing in the Federal Power Act indicates that the private power rights in navigable waters were to be recognized by the Commission or the United states to any greater extent than were the rights involved in *Chandler-Dunbar.*[7]

[7] The Federal Water Power Act of 1920 may be traced at least as far back as President Theodore Roosevelt's veto of the Rainy River bill, 1908, decrying the policy of "giving away the property of the people in the flowing waters" (42 Cong. Rec. 4698). The River and Harbor Act of 1890 (26 Stat. 426, 454) required either federal or state authorization, in appropriate circumstances, for obstruction to navigable streams. Sections 9 and 10 of the River and Harbor Act of 1899 (30 Stat. 1121, 1151) (Appendix, *infra*, pp. 40–41) made it unlawful to construct certain structures in navigable streams without the consent of Congress and War Department approval, and prohibited, without express Federal authorization, any obstruction to the navigable capacity of any of the navigable waters of the United States. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424.

The Burton Act of June 29, 1906 (34 Stat. 626) expressly made any Federal permits for the use of the waters of the Niagara River for power development revocable at will, and fixed a final termination date for those permits, as did all extensions of the Act. *Sanitary District* v. *United States*, 266 U. S. 405, 431. See also 54 Cong. Rec. 704, 55 Cong. Rec. 4541.

During the consideration of the Federal Water Power Act, an amendment was offered to the bill to exclude the Niagara

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Both the majority and dissenting judges of the court below recognized (R. 604–605, 612–613) that the crucial section on the issue of interpretation of the Federal Power Act was Section 27, *infra*, pp. 39–40, which provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in *irrigation or for municipal or other* uses, or any vested right acquired therein. [Emphasis added.]

Clearly the use of water for power purposes is not an "irrigation" or "municipal" use. These are consumptive water uses and would also include rights to water for domestic purposes and for stock watering, the type of uses which generally and more especially in the arid West are vital to the preservation of life and the maintenance of the economy of the area. On the other

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River from its coverage (59 Cong. Rec. 1483–1484, 1487–1494). Chairman Wadsworth, in charge of the bill for the Commerce Committee, opposed the amendment and assured the Senate (*id.* at 1485–1486) that "the company now operating at Niagara Falls will fall completely under the jurisdiction of the commission just as any other water-power company anywhere in the United States falls under it."

The International Boundary Waters Treaty of 1910 (36 Stat. 2448, 2450), relied upon by the court below (R. 602–603) was, of course, an agreement between the United States and Canada and did not relate to the question as to whether federal or state laws should control the diversions allowed in the United States. Cf. *Niagara Falls Power Co.* v. *Federal Power Commission*, *supra*, at 790.

hand, the use of water for power purposes is obviously not a consumptive use and state laws for its control are not protected against supersedure by Section 27 of the Power Act, at least insofar as navigable waters of the type here involved are concerned. As this Court held in *First Iowa Coop.* v. *Power Commission,* 328 U. S. 152, 175–176:

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses *of the same nature.* It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." *Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.* This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that "a proper construction of the act requires that the words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal.'" *Alabama Power Co.* v. *Gulf Power Co.,* 283 F. 606, 619. [Emphasis added.]

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The issue in the *First Iowa* case was whether requirements imposed by Iowa law were necessary prerequisites to the granting of a license by the Federal Power Commission. This Court held, consistently with the expression quoted above, that the Federal Act superseded state law and that the secururing of a state permit was not a condition precedent to the securing of a federal license.[8] It thus appears that the decision of the court below (R. 607–608)—that "an applicant for a license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him"—is inconsistent with the decision of this Court in *First Iowa*.[9] For, as this Court stated, "The

[8] In proceedings subsequent to the decision of this Court, the Commission issued a license without any showing that the applicant had complied with state laws for waterpower use of the navigable Cedar River, notwithstanding a prohibition in the state law against the diversion proposed. The validity of this license was affirmed by the Court of Appeals for the Eighth Circuit, *State of Iowa* v. *Federal Power Commn.*, 178 F. 2d 421, certiorari denied, 339 U. S. 979.

[9] In referring to the regulatory nature of the Power Act, the lower court distinguished between a claim to the ownership of running waters (which it says is not asserted here) and a claim to usufructuary rights in flowing waters long recognized as incident to riparian land ownership (R. 594). On the other hand, no such distinction was considered relevant by this Court in denying compensation to the Chandler-Dunbar Company for alleged "waterpower rights" acquired under State law or for additional value to uplands strategically located for waterpower development, *United States* v.

detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." 328 U. S., at 181.

The court below attempted to support its conclusion by reference to the language of certain other sections of the Act. None of these sections, however, furnishes substantial support for its result. Section 9 (b) (Appendix, *infra*, p. 32) provides that an applicant for a license must submit to the Commission "satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes * * *." But this section recognizes no waterpower rights under State law. It does not "establish by implication such a substantive policy as that contained in § 27 * * *." It is merely a description of "the evidence which the

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Chandler-Dunbar Co., 229 U. S. 53, 69, 76. The fundamental objection to compensation for loss of such state-conferred "waterpower rights" in the construction of a Federal improvement was there expressed by the Court:

"* * * The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use."

See also *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 88. These two decisions make it clear that the commerce power of the United States, when asserted, is not to be burdened by payment for claims under state law to either the waterpower of navigable streams or to usufructuary rights in such waters.

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Commission shall require in order to pass upon applications for federal licenses." *First Iowa Coop.* v. *Power Commn.,* 328 U. S. at 177. Section 3 (11) (Appendix, *infra,* p. 30) defines "project" as including "all miscellaneous structures * * *, and all water rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit." Section 4 (b) provides that "to determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall * * * file with the Commission * * * a statement * * * showing * * * the price paid for water rights, rights-of-way, lands, or interest in lands. * * *" As Judge Bazelon pointed out (R. 611), neither Section 3 (11) nor 4 (b) recognizes any State water rights. Section 3 is merely a definition of the word, "project" without substantive implications, and Section 4 (b) is "strikingly similar to * * * § 9 (b) and is in no sense a recognition of any rights."

Indeed, Section 14 of the Act expressly provides that when the United States takes over a project at the end of a license period, the net investment, which is the basis for the compensation due the licensee, "shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed

by the Commission under this Act, by the license or by good will, going value, or prospective revenues."[10] And in *United States* v. *Appalachian Power Co.* this Court stated (pp. 427–428):

> It has been shown * * * that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power. We assume without deciding that by compulsion of the method of acquisition provided in § 14 of the Power Act and the tendered license, these riparian rights may pass to the United States for less than their value. In our view this "is the price which [respondents] must pay to secure the right to maintain their dam."

But the result of the decision below will be to require the United States to pay, at the expiration of this period, for water rights which have not been saved by the Act.

In the words of this Court (*First Iowa Coop.* v. *Power Commn.*, 328 U. S. at 180), the Act

> * * * was the outgrowth of a widely supported effort of the conservationists to

[10] The remainder of this clause of the section provides: "nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee." This reference to "water rights" obviously is directed toward those rights saved by Section 27. See *supra*, pp. 17–20.

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> secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

It would require clear and unequivocal language in the statute to warrant holding that water rights used for power purposes were among the rights saved by the Act. Such an expression does not appear. Indeed, the effect of the decision below is inconsistent with those sections.

3. The decision below is in substantial conflict with the reasoning of the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* v. *Power Comm'n,* 137 F. 2d 787, certiorari denied, 320 U. S. 792, rehearing denied, 320 U. S. 815.[11] In

[11] The lower court's decision in the instant case is in harmony with its decision in 1937 in *Alabama Power Co.* v. *McNinch*, 94 F. 2d 601, and its subsequent opinion in the same case in *Alabama Power Co.* v. *Federal Power Commission*, 128 F. 2d 280, certiorari denied, 317 U. S. 652. However, both these cases were decided before this Court's opinion in the *First Iowa* case, and the opinion of the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* Indeed, in the *Alabama Power Company* cases the Commission took a position which was inconsistent with the position taken in regard to the state waterpower rights here involved.

that case the question was whether the property of the licensee (the Niagara Falls Power Company, the immediate predecessor of the respondent) should be valued at fair value under Section 23 (a) (Appendix, *infra,* p. 38) or at net investment, as defined in Section 3 (13) for the purposes of the rate base and the costs of acquisition to the United States. This question in turn depended upon whether the license involved was "for a project * * * already constructed" under a "permit * * * heretofore granted" within the meaning of the Section 23 (a), in which case the licensee could use fair value, which was presumably higher. The company urged, *inter alia,* that Section 23 (a) referred to a state permit or authorization. But the court held that the section referred only to a federal permit. It stated (per Learned Hand, J.) (pp. 790–791):

> * * * When Congress passed the Federal Water Power Act in 1920 * * *, the petitioner's slate was wiped clean; it stood at discretion, so far as concerned any existing federal rights of diversion. Congress had absolute power to stop it from taking any water whatever, or to impose what terms it chose * * *. When Congress set up the Commission with power to issue licenses for the "utilization of power * * * from * * * any of the navigable waters of the United States" * * *the Commission was vested with the distribution of its allotment, and any rights acquired from the

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> State of New York necessarily yielded to what it might do. * * *

The fact that the Second Circuit was dealing with the capitalization of assets and not, as here, with operating expenses, does not, as the court below seemed to think (R. 606), distinguish the two cases. For the principle underlying the two decisions—the effect of the Federal Power Act upon state water rights—is the same, and the practical effect, increasing the cost to the United States of the project upon recapture at the close of the license period or during emergency periods, is directly affected by both capitalization and operating expenses. *Niagara Falls Power Co.* stands for the proposition that state waterpower rights need not be recognized for the purposes of the Federal Power Act. On the other hand, the court below held that the Act did not affect such rights. This basic difference in analysis of the Act and the difference in treatment of the same company, depending upon its choice of circuit for review, present a conflict which requires resolution by this Court.

4. The court below failed to appreciate the difference between the relationship of the Federal authority *vis-a-vis* the licensee on the one hand, and the licensee *vis-a-vis* private parties, on the other. This distinction was clearly pointed out by this Court in *Grand River Dam Authority* v. *Grand-Hydro,* 335 U. S. 359. There the courts of Oklahoma had allowed power-site value for

the dam site of a project, even though the development had been built under a Federal Power Act license. Though holding that such evidence of power-site value was relevant to the question of compensation due the owner for its land, the Court said (pp. 373):

> If either the United States, or its licensee as such, were seeking to acquire this land under the Federal Power Act, it might face different considerations from those stated above. The United States enjoys special rights and power in relation to navigable streams and also to streams which affect interstate commerce. The United States, however, is not a party to the present case. It is not asserting its right to condemn this land. The petitioner, likewise, is not seeking to enforce such rights as it might have to condemn this land by virtue of its federal license. Accordingly, we express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States or by one of its licensees in reliance upon rights derived under the Federal Power Act.

The Court then went on to state (pp. 374–375) that the question as to the effect of the provisions of the Federal Power Act concerning the rate base of the licensee and the acquisition price were not before it and that no opinion was expressed on those issues. On the other hand, the dissenting opinion clearly reached the issue and asserted its belief that the Act had wiped out any

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waterpower value to a private party, who, by reason of Federal law, neither had nor could acquire any lawful claim to it (*id.* at 375–376).

The effect of the majority opinion in *Grand River Dam* is to draw a distinction between the requirements the Federal authority may place upon the licensee and the relationship between the licensee and third parties. Thus, even if it is assumed (contrary to our contentions) that the Federal Power Act did not wipe out State waterpower rights as between private parties, it does not follow that the Act did not wipe out those rights as between the licensee and the United States and its regulatory agency. In *Regents of the University System of Georgia* v. *Carroll*, 338 U. S. 586, the Federal Communications Commission had required the breach of a contract between the licensee and a third party as a condition of the Federal license. The third party brought a successful suit for damages in the State court over the contention of the licensee that the requirement of the Commission was superior to any private contract. This Court affirmed the judgment for the third party, holding that the question of the rights between the licensee and the third party did not affect the licensing power of the Federal Communications Commission.[12]

[12] This distinction between rights of third parties and licensees, on the one hand, and rights of the licensee and the Commission, on the other, makes any reliance by the respondent upon cases such as *Ford & Son* v. *Little Falls Co.*, 280 U. S. 369, misplaced.

In this case it may be that the disallowance of the payments by the respondent to the Buffalo Niagara Power Company and the International Paper Company will lead the respondent to refuse to recognize its contract with those companies, resulting in suits for damages by those companies against the respondent. It is our contention that such a suit should not prevail, inasmuch as the Federal Power Act has wiped out the state waterpower rights claimed by the Buffalo Niagara and International Paper. Even if this contention is not sustained, the fact that respondent may be liable in damages for breach of the contract, does not, under *Regents* v. *Carroll,* affect the power of the Commission to disallow the payments as a condition of the license it has granted to the respondent.

The scheme of the Act places the Federal Power Commission and the United States in a completely different position from that enjoyed by the private parties in the *Grand River Dam* case. The United States is concededly the ultimate owner of all water rights in navigable streams. The question the majority in the *Grand River Dam* case did not reach is the question presented by this case: the effect of state waterpower rights upon the federal regulatory agency and the United States. It is our position that, in finding those rights binding upon the Commission directly, and the United States somewhat more indirectly (see pp. 13–14, *supra*), the

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court below failed to follow the principles set forth by this Court in the *Chandler-Dunbar, Appalachian Power* and *First Iowa Coop.* cases (all *supra*). In any event, we believe the questions presented are ones which this Court should decided at this time. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 421.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

MARCH 1953

APPENDIX

FEDERAL POWER ACT

The following sections are taken from the Federal Power Act, as amended August 26, 1935. The Act was originally approved June 10, 1920 (41 Stat. 1063) and amended August 26, 1935 (49 Stat. 838), insofar as pertinent here, 16 U. S. C. 791a–825r.

> Sec. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:
>
> * * * * *
>
> (11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;
>
> * * * * *

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Sec. 4. The Commission is hereby authorized and empowered—

* * * * *

(b) To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works neces-

sary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided:

* * * * *

Sec. 9. That each applicant for a license hereunder shall submit to the commission—

* * * * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this Act.

* * * * *

Sec. 10. All licenses issued under this Part shall be on the following conditions:

* * * * *

(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the

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net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

* * * * *

Sec. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the

Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided,* That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

* * * * *

Sec. 16. That when in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project, or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party

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or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the Commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee.

* * * * *

Sec. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of

said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided,* That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

Sec. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or

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character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any evaluation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be

claimed or allowed for the rights granted by the commission or by this Act.

* * * * *

Sec. 23. (a) The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided,* That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

* * * * *

Sec. 26. That the Attorney General may, on request of the commission or of the Secretary of War, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any

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permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the abovementioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders, and decrees to compel compliance with the lawful orders and regulations of the commission and of the Secretary of War, and to compel the performance of any condition imposed under the provisions of this Act. In the event a decree revoking a license is entered, the court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same, and to make and enforce such further orders and decrees as equity and justice may require. At such sale or sales the vendee shall take the rights and privileges belonging to the licensee and shall perform the duties of such licensee and assume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a purchaser, but it shall not be required to pay a greater amount than it would be required to pay under the provisions of section 14 hereof at the termination of the license.

Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere

with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

RIVER AND HARBOR ACT APPROVED MARCH 3, 1899

30 Stat. 1121, 1151

* * * * *

Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

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Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

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54 Cong. Rec. 689, 704	58
55 Cong. Rec. 4541	58
56 Cong. Rec. 9282	19, 28, 29
56 Cong. Rec. 9284	18
56 Cong. Rec. 9810	46
56 Cong. Rec. 9957	19
57 Cong. Rec. 4638	19
59 Cong. Rec. 1482	33, 47
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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 28

FEDERAL POWER COMMISSION, PETITIONER

v.

NIAGARA MOHAWK POWER CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 585–613) is reported at 202 F. 2d 190. The Commission's opinion and order (R. 105–117) is reported at 9 F. P. C. 228.

JURISDICTION

The judgment of the Court of Appeals (R. 613–614) was entered on December 31, 1952. The petition for certiorari was filed March 30, 1953, and was granted on May 18, 1953 (R. 617). The jurisdiction of this Court rests upon Section 313 (b) of the Federal Power Act and 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The respondent, the Niagara Mohawk Power Corporation, a licensee under Part I of the Federal Power Act,[1] paid two other companies for water power rights those companies claimed to possess under state law to the use of the water of the navigable Niagara River. The use of such water through the Niagara Falls project by the respondent was expressly authorized under a Federal Power Act license for that project. In computing the amortization reserve of the respondent required by Section 10 (d) of the Act, the Commission disallowed these payments for the water power rights. The Court of Appeals reversed, holding that the payments were legitimate project expenses and properly allowable in computing the amortization reserve of Section 10 (d).

The questions presented are:

1. Are state laws authorizing water power use of a navigable stream and water power rights acquired thereunder superseded by the Federal Power Act and a license pursuant thereto granting federal authority for the use of such stream for water power development?

2. Is a party licensed under the Federal Power Act to use the waters of a navigable stream through a hydroelectric project required to com-

[1] 16 U. S. C. 791a *et seq.* The Federal Water Power Act of 1920, as amended, is Part I of the present Federal Power Act.

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pensate another company for taking the latter's water power rights acquired under state law for power use of the same water?

3. Are payments by federally licensed companies, with express authorization to use certain water power, to owners of the alleged water power rights under state law, properly allowable as legitimate operating expenses under the Federal Power Act?

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (41 Stat. 1063, 16 U. S. C. 791a, *et seq.*), and of the River and Harbor Act of 1899 (30 Stat. 1121, 33 U. S. C. 401, 403) are included in the Statutory Appendix ("Stat. App."), which is being filed with this brief.

STATEMENT

On March 2, 1921, the Federal Power Commission issued a license to Niagara Falls Power Company ("licensee")[2] under Part I of the Federal Power Act for a water power project along the Niagara River on the New York side of the international boundary at Niagara Falls, designated as Project No. 16. The license for Project No. 16 authorized licensee to divert water from the Ni-

[2] The license was issued on March 2, 1921, to Niagara Falls Power Company, which merged with the respondent on October 19, 1950. Nothing in the case turns on the merger and, for convenience, "licensee" is used to refer to the company holding the license.

agara River at the rate of 19,500 c. f. s.[3] around the Falls for water power development (R. 382). Pursuant to Section 10 (d) of the Act (Stat. App. 11, 12), the license specified six percent as a reasonable rate of return and provided that one-half of the earnings in excess thereof should, after twenty years of operation, be transferred to the amortization reserve required by that Section.

In proceedings brought to determine such excess income, the Commission, in its order of September 25, 1950, found that during the period March 2, 1941, through December 31, 1946, the licensee had unlawfully increased its Project operating expenses by annual payments of $99,000, totalling $577,500 during the five-year period, to International Paper Company for the use of water rights claimed by International Paper under state law. The Commission also found that during this period licensee had unlawfully reduced its annual revenue by making rebates or credits on electric energy sold first to its affiliate, Niagara Lockport and Ontario Power Company, and subsequently to its parent, Buffalo Niagara Electric Corporation, which at the rate of other energy sold to those companies amounted to $37,800 per year or $220,500 during the five-year period. These credits to its affiliate and to its parent were said to be made by licensee in payment for the use of water rights claimed under

[3] Subsequently increased to 20,000 c. f. s.

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state law. The Commission disallowed payments and credits made by the licensee during the period March 2, 1941, through December 31, 1946, for the use of the alleged water rights, in a total amount of $798,000 and ordered that $399,000, which represents one-half of this disallowance, be included in the amortization reserve account.

The alleged state water rights which form the basis of the payments here involved stem from a series of water power grants from the State of New York to the corporate predecessors of licensee,[4] made in 1892 and 1893 to Niagara Falls Power Co.[5] and in 1896 to Niagara Falls Hydraulic Power and Manufacturing Co.[6] See *Niagara Falls Power Co.* v. *Water Power & Control Comm.*, 267 N. Y. 265, 272.

(a) *International Paper Water Rights.*—As a result of a series of leases and conveyances and option agreements entered into between Niagara Falls Power Co. and International Paper Company (or its predecessor the Soo Paper Company) the paper companies were permitted to use 730

[4] Niagara Falls Power Company, which was the licensee during the five-year period here involved, was formed in 1918 by the consolidation of (original) Niagara Falls Power Company, Hydraulic Company of Niagara Falls (originally Niagara Falls Hydraulic Power and Manufacturing Co.), and Cliff Electric Distributing Co. (Laws of New York of 1918, Ch. 596, R. 406).

[5] New York Laws of 1892, Ch. 513, and 1893, Ch. 477 (R. 403–405).

[6] New York Laws of 1896, Ch. 968 (R. 405).

c. f. s. of Niagara Power's water, acquired under temporary and revocable War Department permits and State grants, at a rental of approximately $75,562 per annum (R. 168–209, 220–223). In 1919 International Paper released and "conditionally surrendered" to its grantor the water power rights leased by it in consideration of rate concessions which, in 1937, were converted into flat annual payments of $99,000 (R. 220–247). International Paper never had, nor does it now have, a license from the Federal Power Commission to use such water.

(b) *Pettebone-Cataract Water Rights.*—The second disallowed item of $220,500 goes back to a contract dated January 1, 1900, between Niagara Falls Hydraulic Power and Manufacturing Company and two manufacturing companies, referred to as the Pettebone-Cataract Companies, pursuant to which the latter were given the right to withdraw 262.6 c. f. s. of Niagara Hydraulic's water. In 1925 the Pettebone-Cataract Companies were acquired by Niagara Lockport and Ontario Power Company, an affiliate of Niagara Falls Power Company.[7] By deed dated May 1, 1925, but recorded July 6, 1925 (R. 280, 292), Niagara Lockport conveyed to its affiliate, the licensee, all of the assets of the Pettebone-Cataract Companies, except the rights to the 262.6 c. f. s. of

[7] Niagara Lockport and Niagara Falls Power Company became affiliates on May 11, 1925. Poor, *Public Utilities* (1926) 1150.

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water (R. 283–284). Those Niagara Lockport leased to the licensee in return for the above-mentioned rate concessions. In 1945 Niagara Lockport was merged with Buffalo Niagara, its own parent and also the parent of licensee.

On January 24, 1921, in support of its application pending before the Commission, licensee (then an applicant) stated that it had "the legal proprietary right to the use" of at least the 20,000 c. f. s. of water permitted by the 1910 Treaty with Great Britain and that "no other person or corporation has any lawful authority under the laws of the State of New York or is qualified under the Federal Water Power Act to use or divert such waters for power purposes, or to apply for a preliminary permit or license therefor" (R. 374–375). However, in Article 13 of the license, the Commission recognized that the International Paper Company and the Pettebone-Cataract interests made claims to water rights at Niagara Falls under State laws (R. 384). The pertinent parts of Article 13 provide:

> 13. In the event that the United States or a new licensee shall take over the project of the licensee pursuant to the provisions of the Act, * * * such taking over of the project shall also be subject to the rights, *if any,* of Pettebone-Cataract Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic canal or basin of licensee, and to the

rights, *if any,* of International Paper Company. [Italics supplied.]

By application dated February 14, 1947 (R. 257), as supplemented March 7, 1947 (R. 306), licensee requested amendment of the license for Project No. 16 to include the so-called Pettebone-Cataract water rights which licensee proposed to acquire from its parent, Buffalo Niagara. The licensee, in its application, as supplemented, for amendment of the license, stated (R. 306–307) that:

> The license in its present form appears to us specifically to exclude from project property the water rights of the Pettebone-Cataract Paper Company and Cataract City Milling Company outstanding as of March 2, 1921. These rights were acquired by a predecessor of Buffalo Niagara Electric Corporation in 1925 and have since that year been used by us under lease in the generation of electric energy in the Schoellkopf Station which is a portion of the property under license in Project 16.
>
> It is the purpose of our requested amendment of license for Project 16, and we hereby so apply, to have the license amendment include in the project the so-called Pettebone-Cataract water rights which are to be acquired from Buffalo Niagara Electric Corporation.
>
> * * * * *
>
> We propose to include the payment of $728,415.48 for the Pettebone-Cataract water

> rights in the actual legitimate original cost of Project 16 upon acquisition of such rights.

This application was denied on the basis that licensee already possessed these water rights pursuant to its federal license (R. 387–393). The Commission held (R. 389):

> * * * In our opinion Buffalo Niagara Electric Corporation does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States. *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 66. * * * The licensee already has the right, under the license, to use the 262.6 c. f. s. which is the subject of its petition, and it is futile for it to attempt to purchase that which it already possesses to the fullest extent of the law.

Licensee did not seek the review of this decision, although warned by the Commission that it had thereby waived the right to reopen this issue (R. 592–593). In the instant case, the Commission, while considering its earlier decision *res judicata,* also held that it was correct in substance (R. 109).

Respondent filed a petition (R. 1) in the Court of Appeals for the District of Columbia Circuit for the review of the Commission's order (R. 115–117) of September 25, 1950, disallowing the payments and credits for use of water rights in de-

termining licensee's amortization reserve liability under Section 10 (d) of the Act for the period March 2, 1941, through December 31, 1946. The majority of the court below (Kimbrough Stone and Miller, JJ.) held that the Commission improperly refused to recognize any charges by other companies for the licensee's use of their water rights originating in leases made by the licensee's predecessors. The Court of Appeals held that a license under the Federal Power Act was a mere permission to use a state's grant of authority and conferred no right to divert water. "An applicant for a license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him." (R. 607–608.) The court concluded that the Act disclosed an intention to give full weight to state ownership of water power rights in navigable waters as grounded in state law. And since in its opinion these water power rights were valid usufructuary property rights under the law of New York which were left undisturbed by the paramount federal power, the payments and credits the licensee made in discharge of its contractual obligations were proper operating expenses.

Judge Bazelon, reading this Court's opinion in *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152, to hold that in the Power Act Congress asserted the dominant federal authority over

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navigable waters, which superseded all private water rights affecting navigable waters except those expressly saved, and did not save the rights in question, dissented.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that Congress has not by the Federal Power Act and its predecessor statutes asserted its dominant authority over navigable waters of the United States in so far as concerns water power development.

2. In holding that state laws authorizing water power use of navigable streams and water power rights acquired thereunder are not superseded by the Federal Power Act and a license thereunder.

3. In holding that a Federal Power Act licensee, licensed to use the waters of a navigable stream through the project covered by the license, is also required to comply with state laws relating to the power use of such waters, and that the licensee is required to compensate other parties for taking their water power rights under state law, if the licensee uses the water covered by such state rights for power development under the license.

4. In holding that payments by the respondent company to others for their state water power rights were legitimate operating expenses for the purpose of computing the respondent's amortization reserve under Section 10 (d) of the Act.

SUMMARY OF ARGUMENT

The decision of the court below—that the Federal Water Power Act of 1920 did not abolish private, state created water power rights, and that, for the purposes of Section 10 (d) of the Act, these rights are binding upon the United States and the Federal Power Commission—is inconsistent with the decisions of this Court and defeats the purposes of the Act. Under that decision the United States and consumers must pay for "rights" which are subject to abolition by the United States without compensation. This construction of the Act finds no substantial support in the language, in the history, or in the purposes of the Act.

I

It is uncontrovertible that the United States has the power to appropriate or destroy water power rights in navigable streams without compensation. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. The primary question in this case is whether such rights were terminated by the Federal Power Act of 1920.

A. The decision below frustrates the purposes of the Act. It forces the United States and consumers to pay for private water power rights, considerably reducing the economic advantages of a hydroelectric plant. Further, it subjects the financial soundness of licensed projects (*First Iowa Coop.* v. *Federal Power Commission*, 328

U. S. 152) to payments made by licensees to non-licensees, over which the Commission has no control. It gives value to "rights" which, in the absence of a license, are valueless; it gives private interests first mortgages on the water power of the Nation. Not only is there no clear and unequivocal manifestation of a Congressional purpose to effect this untoward result; the indications are quite the other way.

B. (1) The Federal Power Act of 1920 is based on the theory that the water power in the navigable rivers of the Nation belongs to the people and that the licenses granted under the Act are a means of making those natural resources available to the people. The Act consequently provides for the issuance of licenses to private corporations, with the project subject to recapture at the end of the fifty-year license period. The court below, therefore, clearly erred in holding that the license is merely a federal permission to use state created rights to water power.

(2) Consistently with this agency or chosen instrument theory, Congress asserted in the Act its paramount interest in the water power in navigable rivers, and transferred all its authority to its licensee. See Section 4 (e). That this assertion took the form of a prohibition of structures in navigable streams rather than the form of a real property condemnation is immaterial. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. The

fact is that the United States claimed its dominant right in the navigable streams and private rights were, accordingly, extinguished.

C. Even without reference to this theory, it is clear that Congress completely preempted the field of the development of water power so as to eradicate private water power rights, which are inconsistent with that preemption. *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152. The expressions on the floor of Congress during the consideration of the Bill which became the Act make it quite clear that Congress was fully aware of the completeness of the control it was establishing in the Act. Unless private rights were expressly saved by the Act, they were necessarily abolished.

D. There is nothing in the Act which preserves private water power rights. Section 27, upon which the court below relied, does not preserve water power rights. Rather, it preserves rights of an irrigation or traditionally municipal nature, not power rights. *First Iowa Coop., supra.* And this conclusion is bolstered by the other sections of the Act.

II

The circumstances under which these private rights were allegedly created point up the untenability of the contention that the Act was not intended to affect the validity of such private rights.

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A. Under the laws of New York, these rights are highly attenuated, and the reserved power of the State has been actually exercised to such an extent that little but an empty shell is left. *Niagara Falls Power Co.* v. *Water Power & Control Commission,* 267 N. Y. 265; *Niagara Falls Power Company* v. *Duryea,* 185 Misc. (N. Y.) 696. Accordingly, assuming that these rights are valid to some extent under the laws of New York, they were subject to such a high degree of defeasibility that the term "vested" in its ordinary connotation cannot be applied to them.

Both sets of rights for which the payments in question were made, are the result of complicated transactions, by which particular water power rights were specially and unusually preserved. Even assuming that these transactions were at arms-length, the reliance of the respondent upon their validity should be given little weight, for these payments involve only five percent of the rights respondent uses, and the other 95 percent are the subject of potential claims of its own. Its own self-interest would not lead it to disavow the contracts. Indeed, these transactions point up the unlikelihood that Congress intended to impose upon the public the necessity of paying for such "rights."

C. The legislative history of the Federal Water Power Act of 1920, starting with the Burton Act of 1906, demonstrates clearly that Congress knew

of the diversion from the Niagara River by the respondent and its predecessors in interest, and considered such diversions usurpations, which were not to be recognized.

III

The Federal Power Commission has the authority to disallow actual expenditures if they are not of a legitimate nature. The disallowance of the payments in question was, for the reasons above stated, quite proper.

Moreover, even if there were some aspects of "legality" to the transactions as between the parties, it is clear that, insofar as the Federal Power Commission and the United States are concerned, the transactions have no binding effects. *Board of Regents* v. *Carroll,* 338 U. S. 586. This Court has itself indicated that such type of transactions need not be recognized as binding upon the United States just because they may be binding upon the parties. *Grand River Dam Authority* v. *Grand-Hydro,* 335 U. S. 359. Consequently, even if the respondent had a legal obligation to make the payments in question, they were properly disallowed by the Federal Power Commission.

ARGUMENT

In 1913, contemporaneously with the introduction in the Congress of the bills which eventually became the Federal Water Power Act of 1920, this Court stated in no uncertain terms, "that the

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running water in a great navigable stream is capable of private ownership is inconceivable." *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 69. Subsequently, in 1940, twenty years after the passage of the Power Act, this Court was faced with the contention (and forty-one states joined in support of the argument) that certain aspects of the Act were unconstitutional, as a violation of the reserved powers of the states under the Tenth Amendment. This Court rejected the contention, repeating with approval the language of *Chandler-Dunbar* and further stating, "Exclusion of riparian owners from [a great navigable stream's] benefits without compensation is entirely within the Government's discretion. * * * [T]here is no private property in the flow of the stream." *United States* v. *Appalachian Power Co.,* 311 U. S. 377, 424, 427.

Under the Federal Power Act, the Federal Power Commission is charged with the duty of issuing licenses for the development of electrical power. Accordingly, the Commission has complete regulatory control over the terms of the license and over the licensee. The issue in this case arises out of the requirements of Section 10 (d) of the Act. This section provides that, after the first twenty years of operations, a portion of the excess profit of the licensee shall be transferred to an amortization reserve account which, at the discretion of the Commission, shall either be held until the termination of the license or

applied in reduction of the net investment, and that the license shall state what rate of return is to be considered excessive and what percentage of the surplus earnings is to be transferred to the amortization reserve. Respondent's license provides that earnings in excess of six per centum are to be considered surplus and that one-half of such surplus should be transferred to the amortization reserve (R. 4).

The proper computation of the amortization reserve is of great importance to the parties, since, as mentioned above, it serves to reduce the licensee's net investment, and the latter in turn determines four important and far reaching financial issues, viz: (a) the price the United States has to pay should it decide to recapture the project at the end of the fifty-year licensing period (Section 14, Stat. App. 16); (b) the rental due if the United States should requisition the project during a period of national emergency (Section 16, Stat. App. 17); (c) the price the United States would have to pay for the project if it should acquire it at a judicial sale following the revocation of the license (Section 26, Stat. App. 24); and (d) a basis for rate fixing (Section 20, Stat. App. 20).[8]

[8] The function intended to be served by this amortization reserve was probably best expressed by Representative Parker in his discussion of an earlier version of Section 10 (d) (56 Cong. Rec. 9284):

"* * * it is the duty of the commission * * * to find out what the earnings have been. If they are less than a fair

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It is undisputed that the Federal Power Commission has the responsibility of disallowing payments which are not "legitimate" in nature. See p. 60, *infra*. Nevertheless, the court below has held that the tenuous, almost transcendental water power rights for which the respondent makes annual payments, are valid, as against the Federal Power Commission and the United States Government, and that the Commission erred in disallowing the payments. This holding is inconsistent with the decisions of this Court, and goes a long way to defeat the purposes of the Federal Power Act. Under this decision the United States will have to pay for privately owned water rights, which are subject to complete abolition by both the State and the Federal Government without compensation, which have been completely severed from the land, and which are obviously worthless without the approval of the Federal Power Commission. The development of the

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return upon the cost of the investment, they will go to the licensee. If they are more than a fair return—and what will be a fair return will be expressed in the lease—then they may be applied and shall be applied under the contract, either to the reduction of the original cost and of the amount that the Government will have to pay upon recapture, or else they will be applied to a reduction of rates, so that the public will get the benefit * * *."

See also remarks of Representative Anderson, 56 Cong. Rec. 9282; Representative Esch, 56 Cong. Rec. 9957, 57 Cong. Rec. 4638; 1918 Print of Hearings Before the Special House Committee on Water Power (pp. 650–659).

Niagara River, one of the greatest sources of hydroelectric power in this nation, and one of the chief concerns of Congress in its consideration of the Federal Water Power Act of 1920, will be hobbled by these payments for private water rights—originating out of complicated intercorporate transactions and deriving only from state grants and temporary federal permits—saving only the circumstance that the United States, by some eminent domain proceedings, shall formally confiscate the "rights." This alternative is as dubious as it is speculative. The Federal Water Power Act "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so * * *." *First Iowa Coop.* v. *Federal Power Comm'n,* 328 U. S. 152, 180. And that power is as broad as the commerce power itself. *United States* v. *Appalachian Power Co., supra,* at 423–424, 427. To hold, as did the court below, that the United States is restricted by these privately owned water rights, is to raise the formalistic terminology of property law to the level of federal power. There is no substantial basis for this result, in the language, in the history or in the purposes of the Federal Power Act.

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I

THE FEDERAL WATER POWER ACT OF 1920 ELIMINATED PRIVATE WATER POWER RIGHTS IN NAVIGABLE STREAMS

Whatever may be said about the existence and validity of the water power rights for which the payments in question were made, it is indisputable that the United States has the dominant right in navigable rivers; that under the commerce clause it may control, improve or regulate such rivers without restraint by prior private "rights" or by state authority; and that, assuming such rights are "vested" and otherwise unassailable, the United States could nevertheless appropriate or destroy them. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 87; *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 423–424; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 595–597; *United States* v. *Commodore Park*, 324 U. S. 386, 390; *United States* v. *Willow River Co.*, 324 U. S. 499, 509; *United States* v. *Kansas City Insurance Co.*, 339 U. S. 799, 804–808. It is further uncontrovertible that when the United States exercises this dominant right, it need not pay compensation to the person who under state law may hold "technical" legal title (*United States* v. *Commodore Park, supra*). As has been pointed out by this Court (*United*

States v. *Appalachian Power Co.*, 311 U. S. 377, 424):

> * * * The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of riparian owners from its benefits *without compensation* is entirely within the Government's discretion. [Italics added.]

It is therefore an uncontrovertible starting point that Congress had the power to extinguish without compensation the water rights involved in this litigation. It is our position that in enacting the Federal Water Power Act of 1920 Congress (a) asserted the Federal Government's dominant right over water power rights in navigable streams, and extinguished without compensation all private water power rights under state law, and (b) so occupied the field that it necessarily terminated water rights based on state law to the extent that they were not expressly saved from supersedure, and that the water power rights here involved were not so saved.

A. THE PURPOSES OF THE FEDERAL WATER POWER ACT WOULD BE FRUSTRATED WERE PRIVATE WATER POWER RIGHTS STILL TO BE RECOGNIZED

Despite the fact that it conceded that the United States had the superior right to the flow of a navigable stream (R. 600), the court below

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held that the Federal Water Power Act of 1920 continued to recognize pre-existing water power rights. Under this decision, the United States will have to pay for those rights upon recapture and every year consumers will have to pay for those rights in their rates. In this case, for example, the Company pays out $136,800 per year for the "private water power rights" as operating expenses. As these rights represent only five percent of the power the company uses, the consumers would be forced to pay almost $2,600,000 annually, were the remaining "rights" in private hands and were similar charges assessed. To a substantial extent the recognition of such rights vitiates the advantage of a hydro-electric plant, whose benefits lie mainly in its low operating expenses, which usually more than offset its higher initial cost and interest charges. Third Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1923, p. 7. Indeed, the recognition of such rights may very well have the effect of curtailing the development of hydro-electric power in those marginal projects which, unlike ~~those~~ that in the Niagara here, are not so readily susceptible of economic development of water power.

Further, despite the fact that the Act demonstrates "the obvious concern [of the Federal Government] in maintaining control over [the licensed project's] engineering, economic and financial soundness * * *" (*First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152, 172), that concern is subjected, under the decision below,

to payments made by licensees, over which the Commission has substantially complete control, to non-licensees, over which the Commission has no control, and which, under the decision below, could charge for the rights concerned to a point where effective regulation of licensees would be impracticable.

This decision means that private water power rights, which are worthless in the absence of a Commission license, must be paid for by anyone who does obtain a license. Indeed, under the decision below, the State could create water power rights in non-licensees even after the issuance of a license, and thus inordinately hamper the effective use of water power. The distinction between private ownership of flowing waters and a usufructuary property right, drawn by the court below (R. 594–595), accords to private interests first mortgages on the water power of the Nation, and elevates those interests above the Federal Government and the consumer—a complete reversal of the purposes of the Act.

In large part, the decision below rests upon the holding that the federal license was not a primary or original source of authority inasmuch as, according to the court below, the issuance of a license to use navigable water power "negates the idea that it declares all such water necessary for use in commerce," and is an implicit determination by the Commission that "the entire flow of the Niagara was not required for navigation or

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any other use in interstate commerce" (R. 607). But this premise is completely inconsistent with the decision of this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 277, 426, that "navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."[9]

In sum, the holding below is so completely inconsistent with the admitted power of the United States and with the apparent objectives of the Federal Water Power Act of 1920, that it can stand only if there is some clear and unequivocal manifestation of Congressional intent to permit these private rights in the flow of the navigable streams of the nation to encumber the development of the water power of the nation. As we shall show, there is no such manifestation. Indeed, the substantial indications are that Congress intended to "wipe the slate clean" when it enacted the Federal Water Power Act of 1920. See *Niagara Falls Power Co.* v. *Power Comm'n*, 137 F. 2d 787, 790–791 (C. A. 2, per Learned Hand, J.), certiorari denied, 320 U. S. 792, rehearing denied, 320 U. S. 815.

B. CONGRESS ASSERTED ITS DOMINANT SERVITUDE TO THE WATER POWER IN NAVIGABLE RIVERS

(1) *The Licensee is the Agent, i. e., the Chosen Instrument, of the United States.*—The Federal

[9] See also *Gibbons* v. *Ogden*, where Chief Justice Marshall decisively rejected the view that a federal license under the commerce power was merely a permission to use a state grant of authority. 9 Wheat. 1, 69, 211 *et seq.*

Power Act is based on the theory that the water power inherent in the navigable rivers of the Nation belongs to the people and that the licenses granted under the Act are a means of making those natural resources available to the people. Ideologically and historically the Federal Power Act goes back to the conservationist movement of the opening of this century, as articulated by the veto messages of Presidents Theodore Roosevelt and Taft denying approvals to bills authorizing the construction of dam sites across navigable rivers[10] on the ground that this legislation gave away the property of the people without adequate safeguards. *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152; *Chapman* v. *Federal Power Commission,* 345 U. S. 153, 167.

In 1908, President Theodore Roosevelt based his veto message relating to the Rainy River Power Project (42 Cong. Rec. 4698) on the following considerations:

> * * * This natural wealth is the heritage of the people. I see no reason for giving it away. * * *
>
> * * * * *
>
> The present policy pursued in making these grants [special acts of Congress authorizing hydro-electric developments] is unwise in giving away the property of the people in the flowing waters to individuals or organizations practically unknown, and

[10] These bills were required by Section 9 of the River and Harbor Act of 1899 (30 Stat. 1151, 33 U. S. C. 401) (Stat. App. 52).

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> granting in perpetuity these valuable privileges in advance of the formulation of definite plans as to their use. * * *

A year later, in his Veto Message Relating to the Building of a Dam across the James River (43 Cong. Rec. 978–980), President Roosevelt adverted to the same subject:

> * * * This bill gives to the grantee a valuable privilege * * *.
>
> * * * * *
>
> To give away, without conditions, this, one of the greatest of our resources, would be an act of folly. * * *
>
> * * * * *
>
> * * * I consider myself bound, as far as exercise of my executive power will allow, to do for the people, in prevention of monopoly of their resources, what I believe they would do for themselves if they were in a position to act.[11] * * *

These veto messages resulted in an impasse, for even if these natural resources were consid-

[11] See also the Muscle Shoals veto of President Theodore Roosevelt of March 3, 1903, 36 Cong. Rec. 3071; and the Coosa River veto of President Taft of August 24, 1912, 48 Cong. Rec. 11796.

In his James River Veto Message President Theodore Roosevelt prophetically warned that the power companies would try to seek refuge in the twilight zone between federal and state law (43 Cong. Rec. 979). Thus, while respondent is here stressing that the Federal Government did not seek to affect state created riparian rights, it has apparently tried to escape state regulation on the basis of the federal origin of its license. Cf. *Niagara Falls P. Co.* v. *Water P. & C. Commission*, 267 N. Y. 265, 276.

ered as belonging to the Nation, the Federal Government, at that time, was in no position to exploit them. And the resulting delay in the development of cheap water power was heavily felt during World War I.[12]

The Federal Water Power Act consequently proceeds on the theory that although the water power resources belong to the Federal Government (see, *e. g.*, Rep. Anderson, 56 Cong. Rec. 9282), they should be developed by private enterprise where public development is not practicable.[13] Hence, the Act provides for the issuance of licenses to private corporations, the public interest being protected by strict supervision and the provision that the project is subject to recapture at the expiration of the fifty-year period for which the license is granted.[14] As Representative Anderson stated:

[12] Cf. H. Rep. No. 61, 66th Cong., 1st Sess., pp. 2–5.

[13] Cf. Section 7 (Stat. App. 9), giving priority in the issuance of licenses to the United States, states, and municipalities.

[14] See *Chapman* v. *Power Commission*, 345 U. S. 153, 169–170:

"Congress was of course aware that, by granting a license to private enterprise, the Federal Power Commission would not commit the site permanently to private development and preclude all further congressional action. The Commission would, as it did here, simply express its judgment that at the time, private development of the site was consistent with the general conception of the way in which the Roanoke River Basin should be developed. For, at any time short of the fifty years in which a site automatically becomes available to the Government *without compensation*, the Govern-

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> The present bill represents a scheme of development between these two extremes, and contemplates development by private capital under leases of 50 years, which will reserve to the Government the right to supervision of operation and rates and provide for the *recapture of the property* on the expiration of the license period. [56 Cong. Rec. 9282] [Italics supplied.] [15]

It is thus the fundamental theory of the Act that the Federal Government grants to the licensee the right to exploit governmental assets in consideration of the grantee's undertaking to develop this national resource,[16] and that the licensee

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ment may determine that the public interest makes it more desirable that the project be operated publicly and has the right then, by appropriate steps, to take over the project." [Italics supplied.]

[15] See also Sen. Rep. No. 180, 66th Cong., 1st Sess., p. 3:

"We should pass legislation which leads private capital and enterprise to develop these resources under such regulations as will give consumers good service and cheap power, or the Government itself should proceed to make this development. This bill proceeds on the theory of private development with ultimate public ownership possible."

See also *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152, 180–181.

[16] "The grant of a license, being a privilege from the sovereign, can be justified only on the theory of resulting benefit to the public." *Clarion River Power Co.* v. *Smith*, 59 F. 2d 861, 863 (C. A. D. C.), certiorari denied, 287 U. S. 639; *Northern States Power Co.* v. *Federal Power Commission*, 118 F. 2d 141, 144 (C. A. 7); *Alabama Power Co.* v. *Federal Power Commission*, 128 F. 2d 280, 288–289 (C. A. D. C.), certiorari denied, 317 U. S. 652.

is basically an agent or chosen instrument of the Government.[17] This statutory theory that the Government grants its own rights to the water power to its licensee[18] is utterly inconsistent with the concept advanced by the court below that its license is merely superimposed over persisting state created rights to the same water power[19] and that the federal licensee is bound to pay its toll to the owner of such private rights.[20]

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[17] The notion that the utility is the Government's agent goes back to President Taft's Coosa River Veto of August 24, 1912, 48 Cong. Rec. 11796. See also statement of Sen. Newlands at 49 Cong. Rec. 2702; *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 616 (M. D. Ala.).

[18] It will be noted that the scope of rights granted by the license is identical with the range of rights claimed by the Government as the result of the exercise of its dominant power. See *infra*, pp. 32–37.

[19] Learned Hand, J., said in *Niagara Falls Co.* v. *Federal Power Commission*, 137 F. 2d 787, 791 (C. A. 2), certiorari denied, 320 U. S. 792:

"The purpose being to conserve all water power, so far as it was national, it would have been an anomaly to exempt anyone—*states or individuals*—who by an earlier unauthorized occupation had assumed to appropriate any part of this natural resource. No prescription could in law run against the nation; we must not impute to Congress any willingness to grant prescription as a favor. * * * What equitable claim then has a company which relies upon the grant by a state of something beyond its power? What standing does a state's license give it to seize upon the energy of the nation's streams, or to impair their navigability?" [Italics added.]

[20] In this connection it may be pointed out that the United States refrained from imposing upon its licensee a charge for the use of the water power on the ground that such

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(2) *The Assertion by the United States of Its Dominant Servitude Wiped Out Private Rights.*— The circumstance that the United States exercised its dominant servitude over water power rights and granted respondent a license of the rights thus asserted is not of itself, however, conclusive for the decision of this case. Conceivably, the exercise of this paramount right might not have gone so far as to prevent the private holder of the water power rights from asserting his rights or a remnant of them against respondent. This is particularly true since the private power rights and the exercise of the federal servitude are couched in different terms. Thus, under New York law—as under the law of most of the states—the water power rights are defined in terms of riparian ownership.[21] The exercise of the federal dominant right, on the other hand, takes the form of prohibition of the obstruction of the flow of a navigable river or of main-

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exaction would not be borne by the licensee but passed on to the consumer. See, *e. g.*, 59 Cong. Rec. 1572. It would be incongruous to assume that Congress intended to perpetuate the rights of private individuals to levy similar charges on its licensee although it had the power to terminate them.

[21] See, *e. g.*, *United P. B. Co.* v. *Iroquois P. & P. Co.*, 226 N. Y. 38, 44–45:

"* * * The rule of law is familiar that each owner of land contiguous to a natural watercourse has a right, as owner of such land and as naturally connected with and incident to it, to the natural flow of the stream along his land and its descent, and all the force to be derived therefrom, for any domestic or hydraulic purpose to which he may decide to apply it."

taining installations for the development of power along it. We shall show, however, that Congress exercised its rights to a degree that private water power rights may not interfere with the operation of a license.

(a) Section 10 (a) of the Act (Stat. App. 10) requires that the license to be granted

> be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes. * * *

And the licensing provision, Sec. 4 (d) (now Sec. 4 (e) (Stat. App. 6)), prohibits by implication all those acts for which license will be granted.[22] Thus, all the powers the Government has claimed by the Act are intended to be transferred to the licensee.[23] Under Section 4 (e), the Federal Power Commission has authority to issue licenses for the:

> purpose of constructing, operating, and maintaining dams, water conduits, reser-

[22] *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424. Section 23 (b), as amended by the Federal Power Act of 1935 (Stat. App. 22), now contains an express prohibition which, significantly, is virtually identical with the license granted under Section 4 (e) as far as navigable rivers are concerned.

[23] This feature of the Act reinforces the point made *supra*, pp. 25–30, that the licensee stands in the same position as the Federal Government.

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> voirs, power houses, transmission lines or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, from[24] or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States. * * *[25]

The problem becomes whether this grant of license is sufficiently extensive so as to supersede all the riparian water power rights existing under state law as far as the United States and its licensee are concerned.

(b) This very problem was presented to this Court in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, and was answered in the affirmative. In that case the United States had condemned "all lands and property of every kind and description north of the present St. Marys Falls Ship Canal * * * and the international boundary line." 229 U. S. at 56. For several years

[24] The word "from" was inserted in this section on motion of Senator Wadsworth "so that in the event of diversion of water to a distance from the stream, which could not be called 'along' the stream, the case would be covered." 59 Cong. Rec. 1482. The purpose of this amendment was presumably to assure the extension of the Act to respondent's installations along the hydraulic basin (R. 588).

[25] Prior to the 1935 amendment, the Act referred to "the navigable waters of the United States" rather than to "streams and other bodies of water * * *"

prior to that condemnation Chandler-Dunbar Co. had operated a power plant in the rapids at Sault Ste. Marie under revocable permits issued by the Secretary of War.[26] The circuit court before which the condemnation proceedings were held decided that under state law Chandler-Dunbar was the owner of riparian water power rights[27] and awarded to the company $652,332, $550,000 of which represented the estimated value of the water power. 229 U. S. at 58. This Court reversed. It held that the owner was entitled to compensation for its tangible property, movable or real (229 U. S. at 68), but with respect to Chandler-Dunbar's claim to compensation for its water power rights, this Court pointed out that this demand hinged on the question whether these power rights constituted private property (229 U. S. at 69). It held that whatever private property rights might exist in the flow of the stream depended completely on the right to maintain in the river the obstructions necessary to utilize the river's powers. This Court said (229 U. S. at 69–71):

> * * * that the running water in a great navigable stream is capable of private ownership is inconceivable.

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[26] The act authorizing this condemnation terminated every permit, license, or authority issued by the War Department. 229 U. S. at 57.

[27] Transcript of Record, Nos. 783–786, October Term, 1912, pp. 406–407.

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> Whatever substantial private property rights exist in the flow of the stream must come from some right which that company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes.
>
> * * * * *
>
> * * * But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in the assertion of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river. [Citing authorities.] It is for Congress to decide what is and what is not an obstruction to navigation. [Citing authorities.]
>
> * * * * *
>
> Upon what principle can it be said that in requiring the removal of the development works which were in the river upon sufferance, Congress has taken private property for public use without compensation?

And the Court concluded this argument by stressing that the company

> had no property right in the river which has been "taken" (229 U. S. at 74).

Chandler-Dunbar was reaffirmed by this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 423–424, where it was pointed out that

the possession of a state license to use the water power was immaterial against the dominant right of the United States. Again, in *United States* v. *Willow River Co.*, 324 U. S. 499, 509, this Court interpreted the *Chandler-Dunbar* case as holding that a shore owner has no appurtenant property rights in two natural levels of water in front of its land or to the use of the natural difference between the two as a head for power production.

The court below sought to distinguish *Chandler-Dunbar* on the ground that the statute there involved contained an express determination that all the waters in the St. Mary's River were needed for the purposes of navigation and that the Federal Power Act, which does not contain so broad a statement, did not intend to extinguish riparian rights in so sweeping a way (R. 600–602). The stress on the particular nature of the statute in *Chandler-Dunbar* is obviously misplaced. That decision itself points out (at pp. 74–75) that Chandler-Dunbar had no property rights in the river (*supra*, p. 35). Moreover, neither *Appalachian Power* nor *Willow River* contains a qualification to the effect that the existence of private water power rights turns on the extent to which the waters in question were needed for navigation. To the contrary, *Appalachian Power* (at 423–427) stresses that in the Federal Power Act the Congress exercised its dominant right, not only in the limited interest of navigation, but for the broad purposes of commerce in general.

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In other words, this Court has recognized that state water power rights couched in terms of riparian rights, and the federal easement defined as the authority to maintain structures in or along the river, cover the same area and that the prohibition of the latter means that the former rights, which can be exercised only by means of maintaining structures, have been extinguished, as far as the United States (and its licensee)[28] are concerned.[29]

In sum, in view of this Court's decisions and of the language of the Act and its general purposes, we doubt that there could have been a more complete appropriation by the Federal Government of the flow of navigable rivers. But assuming that there do exist some areas left in which private riparian rights might be permitted to have effect,[30] it is incontrovertible that the United

[28] See *supra*, pp. 25–30.

[29] The United States, having the power to exercise its paramount rights without compensation, has not chosen to indemnify the riparian owners for the loss of the water power rights. Such action would have been inconsistent with the philosophy underlying the Act that these rights belonged to the nation (*supra*, pp. 25–30).

[30] This involves especially the rights of riparian owners *inter sese* and as against third persons where no rights based on the Federal servitude are in issue. Cf. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 70; *United States* v. *Willow River Co.*, 324 U. S. 499, 508; *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359, 373; *International Paper Co.* v. *United States*, 280 U. S. 399.

In the *Grand-Hydro* case, the question was whether in computing the condemnation value of a water power site on the Grand River, a nonnavigable river, pursuant to Okla-

States, in the Federal Power Act, has claimed its dominant right to prohibit or to license the maintenance of structures in navigable rivers for the development and utilization of water power and has granted to respondent the right to maintain such structures for the development and utilization of water power. It follows from *Chandler-Dunbar* (see *supra,* pp. 33–35) that riparian water power rights, such as those for which the payments in question were made, were extinguished to the extent that they were inconsistent with this grant.

C. CONGRESS COMPLETELY PREEMPTED THE FIELD OF THE DEVELOPMENT OF WATER POWER FROM NAVIGABLE STREAMS, AND PRIVATE RIGHTS INCONSISTENT WITH THAT PREEMPTION WERE TERMINATED

The foregoing section is designed to show that in the Federal Water Power Act of 1920 Congress asserted its exclusive title to the water power in the navigable waters of the nation. Assuming *arguendo* that this is not so, it nevertheless is clear, from a review of the genesis of the Act and of

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homa law, the jury might take into consideration the availability of the property as a dam site. Although the condemnor held a Federal Power Commission license, it did not base its right to condemnation upon the Federal Power Act or the license issued to it thereunder (335 U. S. at 364, 366). Holding that only Oklahoma law was applicable, pursuant to which the owner was entitled to the value as a power site (335 U. S. at 372–373), this Court expressly pointed out that the decision might be different if the United States or its licensee sought to acquire the property under the Act or by virtue of its license. 335 U. S. at 373. In the instant case, of course, it is the interest of the United States which is directly involved.

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the decisions of this Court interpreting that history, that Congress, considering that the water power in navigable rivers was within the dominion of the United States, specifically exercised its dominant servitude so as to oust all conflicting laws of the states,[31] including any creating private rights in water power.

In *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152, this Court was faced with the contention that an applicant for a Federal Power Commission license had first to show that it had complied with the applicable state law relating to the construction of dams and the diversion of water for power purposes. Analyzing the relation between the states and the Federal Government which had been created in the Federal Power Act, this Court pointed out the "detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls" (328 U. S. at 181). It further held that "in those fields where rights are not thus 'saved' to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course" (328 U. S. at 176). It is, accordingly, indisput-

[31] In *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152, 174, this Court pointed to the carefully designed statutory pattern designed to prevent divided authority over any one subject. Hence, a finding that the Federal Power Commission was granted *some* authority over water power rights would be sufficient to make the federal control complete.

able that with the enactment of the Federal Water Power Act of 1920, the Federal Government entered the field of water power for the first time in a truly comprehensive manner[32] (328 U. S. at 180–181; see also *Federal Power Commission* v. *Idaho Power Company,* 344 U. S. 17, 23). The Act "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so * * *." 328 U. S. at 180. And that power is as broad as the commerce power itself. *United States* v. *Appalachian Power Co., supra,* at 423–424, 427.

Congress was well aware of the completeness of the federal control it was establishing in the new statute. Thus, Congressman Lee, explaining the committee report to the House, stressed:

> Under the terms of the bill the public *retains complete control* of water-power rights on the public lands and in the navigable rivers. No development can be made by any agency other than the

[32] Earlier attempts had been the piecemeal legislation of the River and Harbor Acts of 1890 and 1899, statutes granting authority to build specific water power projects, and temporary legislation dealing with the diversion of water at Niagara Falls, such as the Burton Act of June 29, 1906 (34 Stat. 626) and the Joint Resolutions of January 19, 1917, 39 Stat. 867; June 30, 1917, 40 Stat. 241; June 29, 1918, 40 Stat. 633; July 12, 1919, 41 Stat. 163 (R. 416, 457–471).

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> United States itself, except under the authority of and in accordance with the provisions of a license issued by the commission. * * *
>
> * * * * *
>
> Whenever licenses are issued for developments by private capital, *full public control is retained* over the construction, maintenance, and operation of the project. * * * [59 Cong. Rec. 6527]. [Italics supplied.]

Senator Wadsworth, in charge of the bill in the Senate, made similar statements to demonstrate the sweeping control to be exercised by the Federal Government. Significantly, he spoke with particular reference to the power rights involved in this very litigation:

> However that may be, let me say to the Senator from Mississippi [Senator Harrison] that the one company cannot act or do anything in the future with respect to the diversion of water from above the Falls in contravention of the treaty or without the permission of this commission created under the bill. The company now operating at Niagara Falls will fall *completely* under the jurisdiction of the commission just as any other water-power company in the United States falls under it. * * *
>
> They fall under exactly the same jurisdiction; the Government wields the same power of them. Under the terms of this

> bill the Government can condition the issuance of a permit as it sees fit, and the Niagara company must comply or it can not divert any water * * *. [59 Cong. Rec. 1485.] [Italics supplied.]

Again (at 59 Cong. Rec. 1486), Senator Wadsworth exposed the exclusive powers assumed by the Government under the bill:

> This bill does not confer any perpetual rights for the diversion of water in Niagara Falls upon anybody. The water power company that is there now and all the companies that may be organized there in the future to develop power upon other parts of the river, we will say below the Falls, must come to the commission and get a license, and the commission can prescribe the conditions upon which the license is to be issued. * * *
>
> * * * The Federal Government will be in *complete* control * * *
>
> * * * Our Government has control of the shore on its side of the river and to midstream * * * So long as this bill is careful to clothe the Federal Government through this commission with power to control this question, to straighten out the uncertainty that has existed at this particular point for 30 years as to the right of anybody to do anything, then I think we are perfectly safe.[33] [Italics supplied.]

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[33] *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, 791 (C. A. 2), certiorari denied, 320 U. S. 792. Judge Learned Hand interpreted those statements as "un-

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Inasmuch as the continued existence of private water power rights is completely inconsistent with such a comprehensive control by the Federal Government (see *supra,* pp. 22–25), those rights were necessarily abolished by the preemption of the field by the Federal Government, unless they were expressly and specially saved by the Act. This, we shall show, was not done.

D. THERE IS NO BASIS FOR THE CONTENTION THAT PRIVATE WATER POWER RIGHTS WERE SPECIALLY SAVED BY THE ACT

Inasmuch as Congress intended to make full use of its legislative powers in the field, it recognized "the need for an express 'saving' clause in the Federal Power Act if the usual rules of supersedure are to be overcome." *First Iowa Coop.* v. *Federal Power Commission, supra,* at 175. But, contrary to the belief of the court below (R. 605), the Act does not save the water power rights here involved; indeed, it contains a provision expressly designed to prevent their preservation.

As this Court has pointed out in *First Iowa Coop.* v. *Federal Power Commission, supra,* at 175–180, Section 27 is the saving clause of the Act. It provides:

> * * * That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribu-

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equivocal assertions that the petitioners' existing rights would not be recognized."

> tion of water used in irrigation, or for municipal or other uses, or any vested property right acquired therein.

This provision was fully analyzed in the *First Iowa* case, *supra,* at 175–176:

> * * * The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to *such* proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be in the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that "a proper construction of the act requires that the words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal'." *Alabama Power Co.* v. *Gulf Power Co.,* 283 F. 606, 619. [Italics supplied.]

Accordingly, this Court has determined that Section 27 is limited to the preservation of legislation concerning irrigation or municipal uses of

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water and proprietary rights of the same or related nature. Water power rights in navigable (eastern) rivers obviously do not fall into those exempted categories.[34] This interpretation is supported by the legislative history of Section 27, for it is derived from reclamation laws[35] and public lands bills,[36] not from legislative projects dealing with water power.[37] It is significant that the statements concerning Section 27[38] set forth

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[34] This was the express holding in *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 619 (N. D. Ala.), quoted with approval by this Court in the *First Iowa* case, *supra.*

[35] *United States* v. *Gerlach Livestock Company*, 339 U. S. 725, arose under the Reclamation Act of 1902, and hence the invasion of water rights was considered compensable.

[36] Cf. *First Iowa Corp.* v. *Federal Power Commission*, 328 U. S. 152, 176–177 (fn. 20).

[37] The Federal Water Power Act of 1920 was the result of the consolidation of originally separate legislative projects dealing with public lands and water power. Sen. Rep. 180, 66th Cong., 1st Sess., pp. 5–6.

[38] There is nothing necessarily inconsistent between this interpretation of Section 27, and *Ford & Son* v. *Little Falls Co.*, 280 U. S. 369, which involved very unusual circumstances, was decided without participation of the Federal Power Commission, and without the presentation by the parties of a careful analysis of the Act and its legislative history. Moreover, in the *Ford* case, the right of the Little Falls Co. to maintain its dams in the river was not questioned or considered. Whatever force the decision may have had seems to have been spent with the later decision of this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 427. And finally, the question of the rights between the parties in *Ford* is a completely different one from that between the licensee and the Commission. See *Board of Regents* v. *Carroll*, 338 U. S. 586; *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359.

in the Brief in Opposition at pp. 11–12 all referred to western irrigation rights.[39]

The court below based its conclusion that Congress sought to preserve water power rights not only upon the express saving clause, which it misread, but also by way of implication on the circumstance that the Act repeatedly refers to such interests. This Court, however, has held in the *First Iowa* case, *supra,* that Section 27 is the sole saving clause of the Act, and that a substantive policy, such as the saving of State laws and substantive rights, should not be based on implication. 328 U. S. at 177. The Act itself contains a provision expressly designed to pre-

[39] The statement of Representative LaFollette (56 Cong. Rec. 9810) quoted in the *First Iowa* case (328 U. S. at 174) refers to the property rights in the fast lands and has no bearing on any interests in the raw water.

The House indicated at another occasion its feeling that the administration of and the rights created under the new Act should not previously be burdened with the remnants of the late state system of regulating water power rights. Thus, the House conferees successfully insisted upon the elimination of a Senate amendment which provided:

"* * * that no contract which shall have been lawfully made prior to the passage of this act, not extending beyond the term of the license, for power, light, heat or water, or for the service or delivery of the same to be furnished from any project works, and to which such project works, or the person, company, or corporation constructing, owning, or operating the same shall be subject, shall be affected by any license under this act, and no such person, association or corporation shall be released from any lawful obligation by reason of this act or any license granted thereunder" (H. Rep. No. 910, 66th Cong., 2d Sess., p. 13; See also 59 Cong. Rec. 6385).

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vent the preservation by way of implication of water power rights not based upon federal grants. When the Federal Water Power Act was debated in the Senate, Senator Wadsworth, who, as indicated above, was in charge of the bill, secured an amendment resulting in the insertion of the words "confirming or otherwise affecting any claim" in Section 23 (a) (Stat. App. 22). The purpose of the amendment was explained by Senator Wadsworth as follows (59 Cong. Rec. 1482):

> * * * I have a difficult situation in mind. It is one that the Senator from Wisconsin has often spoken about—the Niagara Falls situation. It so happens that the rights that those companies received there years and years ago, as I understand and recollect, came as grants from the State of New York; and those companies—rightly or wrongly, I do not know which—have claimed, or have indicated that they might claim, certain continuing rights to the diversion of water and the generation of power. It might be said that this claim has been a constantly pending one, but it never has been settled. The Niagara situation always has been uncertain as to its future for that reason. *Now, I do not want this bill in any way to confirm that claim.* [Italics supplied.]

Water rights are mentioned in Sections 3 (11), 4 (b), 9 (b), and 14 of the Act (Stat. App. 4, 5, 10, 16). This Court has pointed out in the *First Iowa* case (328 U. S. at 177 ff.) that Section 9 (b)

does not preserve any rights but merely seeks to secure adequate information. Section 4 (b) serves analogous purposes; Section 3 (11) is merely a definition and may easily be read as referring to the water rights of the licensees resulting from the federal grant. Section 14 provides that upon recapture of a project the United States shall pay compensation for "water rights." This, however, does not mean that *all* water rights have been considered preserved. Section 14 easily may be read as limited to such water rights as were preserved by Section 27.[40]

It is clear, therefore, that state-created water power rights were not preserved by Section 27 of the Act.

II

THE CIRCUMSTANCES UNDER WHICH THESE WATER POWER RIGHTS WERE CREATED SERVE TO SHOW THAT THE FEDERAL WATER POWER ACT OF 1920 CANNOT BE READ TO PRESERVE PRIVATE RIGHTS IN WATER POWER

The previous discussion shows that the Federal Water Power Act, generally, eliminated the basis of claims to private water power rights. Moreover, the circumstances under which these particular rights were allegedly created point up the untenability of the contention that the Act was not intended to affect the validity of such private

[40] Cf. the dissenting opinion of Bazelon, J., R. 611–612. And this interpretation may well apply to all the references to water rights in the Act.

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rights. For these alleged rights were created out of state grants and licenses, admittedly subservient to the rights of the State of New York, and were the result of corporate transactions wherein the licensee had little cause to repudiate the "rights." Further, they allegedly attach to the Niagara River, one of the foremost sources of hydro-electric power in the Nation—the very river which was pointed out during the Congressional consideration as representative of the hampering effect of such claims; indeed, these were the very rights which were expressly designated as not being confirmed by the passage of the Act.

A. THE WATER POWER RIGHTS INVOLVED IN THE INSTANT CASE ARE OF SUCH A HIGHLY ATTENUATED NATURE UNDER STATE LAW AS TO BE NONRECOGNIZABLE UNDER FEDERAL LAW

Even assuming that in the Act Congress did intend to recognize *some* private water power rights, it is highly doubtful, in view of their origin, that the rights in question could satisfy any reasonable test of validity.

Under the laws of New York the riparian owner generally has a right to the natural flow of water in a stream along his land, and this right has been classified as a corporeal hereditament and a real estate (*Matter of Van Etten* v. *City of New York,* 226 N. Y. 483, 486; see also *International Paper Co.* v. *United States,* 282 U. S. 399, 405).[41] It also

[41] The *International Paper* case has no bearing on the issues presented here, inasmuch as it involved events antedating the enactment of the Federal Power Act and the surrender of

has been held that this right can be severed from the riparian land by way of grant, condemnation, relinquishment, or prescription. *United P. B. Co.* v. *Iroquois P. & P. Co.*, 226 N. Y. 38, 47. This, however, does not mean, as the court below apparently held, that New York considered the water rights involved as absolutely vested common law rights, the destruction of which is not readily imputed to Congress (R. 605). For the same New York decisions make it clear beyond doubt that this incorporeal hereditament is subject to the superior rights of the State. *United P. B. Co.* v. *Iroquois P. & P. Co., supra,* at 45, 49.

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the International Paper Company's leases to the grantor (*supra*, pp. 5–6). Thus, the Paper Company had an agreement with respondent's predecessor, itself a Federal licensee under the Act of June 29, 1906, 34 Stat. 626, to use certain amounts of water for power purposes. This Court held that a diversion of that water in 1918 by the Secretary of War from the Paper Company rendered the United States liable in damages to the Paper Company. Contrary to the transfer of federal permission from an original licensee to International Paper Company recognized in that case, Section 8 of the Federal Power Act (Stat. App. 10) prohibits transfer of license rights without written approval of the Federal Power Commission. Admittedly, Commission approval has not been given here (R. 306). Moreover, that case involved a taking under the Fifth Amendment and not an assertion of the Government's dominant easement from navigable rivers. As this Court held, the Secretary of War made no attempt to revoke the license, but proceeded "on the footing of a full recognition of the Paper Company's rights" (as a subpermittee or tenant of the Power Company (R. 419–420)), and of the Government's duty to pay for the taking that he purported to accomplish. 282 U. S. at 407–408.

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With respect to the water power at Niagara Falls the reserved power of the State has been exercised to such an extent that little but an empty shell has been left of the common law riparian water rights. As pointed out above (*supra,* pp. 5–7), respondent's rights to use the water power at Niagara Falls are not based upon its ownership of the shore but upon grants made by the State of New York in the 1890's. Hence, it has been well recognized that the water power rights asserted here are of a highly qualified and tenuous nature, and might even be in conflict with the Constitution of the State of New York.[42] As the New York Court of Appeals said (*Niagara Falls P. Co.* v. *Water P. & C. Commission,* 267 N. Y. 265):

> * * * The petitioner [licensee] claims that by the acts of 1892, 1893 and 1896, it had a grant from the State to rights in the Niagara river of which it could not be divested by subsequent acts, and that it could withdraw 20,000 c. f. s. without paying for it. The answer is that the acts permitting the withdrawal of water were subject to the reserve power of the State to regulate and control the use in behalf of the public, and the privileges and rights granted to the power company were taken subject to this right of the State and also

[42] Cf. *Matter of Long Sault Development Co.*, 212 N. Y. 1, error dismissed, 242 U. S. 272, questioning the power of the State to abdicate state control over a navigable river.

> subject to the control of Congress. The power of Congress to regulate this river is unquestioned * * *. [at 276.]
>
> * * * * *
>
> There are other questions arising which we do not deem it necessary to consider, such, for instance, as the constitutionality of the acts of 1892 and 1893 and 1896 and further, the power of the State at any time to give away to private parties for commercial enterprises the sole use of navigable rivers or the diversion of the water therein. [at 279.] [43]

Thus, assuming that the water power rights involved here were "vested" under the laws of the State of New York, they were manifestly subject to such high degree of defeasibility that the term "vested" in its ordinary connotation cannot be applied to them.

Indeed, effective since 1943, the Company has been paying rent of $1,100,000 annually to the State of New York for these very rights. Sixteenth Annual Report of the New York Power Authority for the Year Ended December 31, 1946, Legis. Doc. (1947) No. 18, p. 46. In sustaining the exaction of rentals to the State, the New York Supreme Court destroyed the foundation for any claim of "riparian ownership" or "private

[43] See also *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. (N. Y.) 696, stressing that the legislative grants to respondent's predecessors in interest were revocable at the will of the legislature.

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usufructuary rights." *Niagara Falls Power Company* v. *Duryea,* 185 Misc. 696. For the State could not require rentals for water rights in private ownership; most certainly, that decision eviscerated the power of the lessor to prevent withdrawals by other parties.[44] See also Section 612 of the Conservation Law (McKinney's Consolidated Laws of New York, Book 10, 1951.)

To argue, as did the court below (R. 598),[45] that such an exaction of rent confirms the private right is completely out of line with reality. The fact of the matter is that under New York law the Company has no "vested right" in any normal sense of the term; to hold that such a tenuous

[44] Indeed, New York itself recognized that requiring the respondent to pay such rentals in fact passes the charges on primarily to the consumer. Thus, the Twelfth Annual Report of Power Authority of the State of New York for the Year Ended December 31, 1942, pp. 67–68, stated:

"Over short periods of time, to be sure, the inflexibility of the company's rates may preclude the company from shifting the burden of a newly imposed rental charge to the pocketbook of its consumers. Sooner or later, however, its effort to shift these rentals is almost sure to be successful. The State would, therefore, be deluding itself if it failed to recognize that any rentals which it may impose upon the Niagara Falls Power Company for the use of the State's water-power resources will ultimately come, not out of any excess profits of the company, but rather out of the consumers of electricity themselves."

[45] The court below recognized that the usufructuary right "is subject to the paramount right of the State to utilize the waters for a public purpose without paying compensation therefor * * *" (R. 595), and that the state legislature might have preempted the entire flow.

interest comes ahead of the interests expressly protected by the Power Act is, clearly, to misconceive the nature of that Act.

B. CONGRESS COULD NOT HAVE INTENDED TO REQUIRE THE CONSUMER AND THE FEDERAL GOVERNMENT TO PAY FOR DEALINGS IN WATER POWER RIGHTS OF THE KIND INVOLVED IN THE INSTANT CASE

1. The origin of the rebate granted Niagara Lockport and Buffalo Niagara has been set forth in detail above (at pp. 6–7). It may be recapitulated briefly as follows: At the beginning of the century respondent's corporate predecessor leased the right to use 262.6 cubic feet of water to the Pettebone-Cataract Companies. The assets of these two corporations were acquired in 1925 by Niagara Lockport, respondent's affiliate. Niagara Lockport conveyed to respondent all the assets of the Pettebone-Cataract Companies except the water power rights. Those it leased to respondent in return for certain rate concessions. As the result of these complicated transactions among affiliates, the Pettebone-Cataract water "rights"—if still in existence—were carefully kept alive with a resulting reduction in respondent's income by $220,500 over the five-year period here involved.

2. The International Paper water rights had their inception in a number of leases and options granted by respondent's predecessor in interest to the predecessor of the Paper Company or the Paper Company itself. By 1919 the Paper Com-

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pany had thus acquired the right to divert 7,200 hp (the approximate equivalent of 730 c. f. s.) at a price of about $10 per annum for each horsepower. In 1919, when the enactment of the Federal Water Power Act was imminent, International Paper released and conditionally surrendered its lease to its lessor. Ordinarily, such surrender would terminate the lease by merging it with the fee.[46] In the instant case, however, the power lease was painstakingly kept alive and the relationship of lessor and lessee reversed. The landlord became the tenant of its own lessee and paid to it charges for the use of its own water. The rental first consisted of a rebate for power charges and later of an annual payment of $99,000, *i. e.*, more than International Paper had paid to Niagara Falls Power. Moreover, considering that International Paper has been released from its duty to pay rent to Niagara Falls Power, respondent now is paying to International Paper Co. more than twice the rate it used to charge its former tenant.

Assuming with the court below (R. 606) that these transactions were entered into at arms' length (but see *A. T. & T. Co.* v. *United States*, 299 U. S. 232, 239; *United States* v. *N. Y. Tel.*

[46] See *e. g.*, *Beall* v. *White*, 94 U. S. 382, 389; *Harris* v. *Hiscock*, 91 N. Y. 340. Moreover, the payments to International Paper Co. would be in the nature of a compensation for the surrender of the lease, *i. e.*, a capital expenditure, and properly disallowed as a current operating expense reducing income.

Co., 326 U. S. 638, 654)[47], they could scarcely be considered as binding upon the Federal Power Commission. For the respondent pays, as a result of these transactions, for only five percent of the water it uses. It has a direct and immediate interest in the preservation of its own claims to the other ninety-five percent. Accordingly, it was quite reasonable, so far as respondent was concerned (but cf. pp. 8–9, *supra*), for it to have accepted the claims of International Paper and of its parent to the private use of the Niagara River.

Indeed, these relations, which are necessarily based on the erroneous premise of the existence of private ownership of the waters of the

[47] The legislative history dealing with Section 10(d) and the related expropriation of excessive profits provision of Section 10(e) (Stat. App. 11) discloses that Congress was seriously concerned with the possibility that profits could be manipulated by dealings between parent and subsidiary. Cf. 59 Cong. Rec. 6524, 7724.

Further, the courts have uniformly sustained findings by the Federal Power Commission that expenses to a licensee which resulted in a profit to an affiliate are not of a legitimate nature. *Alabama Power Company* v. *McNinch*, 94 F. 2d 601, 608, 615, 618 (C. A. D. C.); *Alabama Power Company* v. *Federal Power Commission*, 128 F. 2d 280, 284 (C. A. D. C.), certiorari denied, 317 U. S. 652; *Alabama Power Co.* v. *Federal Power Commission*, 134 F. 2d 602, 609 (C. A. 5); *Puget Sound Power & Light Company* v. *Federal Power Commission*, 137 F. 2d 701, 703 (C. A. D. C.); *Niagara Falls Power Company* v. *Federal Power Commission*, 137 F. 2d 787, 793–794 (C. A. 2), certiorari denied, 320 U. S. 792; *Pennsylvania Power & Light Company* v. *Federal Power Commission*, 139 F. 2d 445, 450 (C. A. 3), certiorari denied, 321 U. S. 798.

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Niagara, are persuasive proof that Congress, in the Federal Water Power Act of 1920, could not have intended to force the consumer and the Federal Government to bear the added costs which such dealings engender.

C. CONGRESS INTENDED TO ABOLISH WATER POWER RIGHTS IN THE NIAGARA RIVER

If there were any doubt as to the meaning of the Federal Water Power Act of 1920, it would be readily resolved by an examination of the specific rights involved in this case. For Congress definitely indicated that it would not countenance the survival of the particular power rights here involved. During the years preceding the enactment of the Water Power Act of 1920, Congress was well aware of the diversion of water by respondent under state grants and indicated plainly that it considered those activities outright usurpations and that it did not consider itself bound by any privileges created under state grants.[48]

Congressional concern with the right to utilize the water power of Niagara Falls under state grants to divert water goes back at least to the Burton Act of June 29, 1906 (34 Stat. 626), which prohibited any diversion of water from the Niagara River unless authorized by a permit

[48] It will be remembered that the rights here involved do not constitute common law riparian rights owned by respondent's lessor but leases of portions of privileges received by respondent's corporate predecessors under state licenses.

revocable at will issued by the Secretary of War. The Burton Act and the licenses issued under it expired in 1913.

From 1913 until 1917 water was withdrawn from the Niagara River without any federal license in spite of the prohibition of the River and Harbor Act of 1899 (30 Stat. 1121).[49] In 1917, as the result of the war emergency, which required full utilization of all available water power, Congress passed a series of joint resolutions authorizing the Secretary of War to issue temporary and revocable licenses to respondent's corporate predecessors to divert water from the Niagara River.[50] The sponsor of these resolutions, which caused much indignant opposition, himself conceded that these companies were diverting the water without authority of law (54 Cong. Rec. 689, 704) but stated that this legislation, unfortunately, was imperative in view of the war and that he hoped that the time soon would come to bring the power companies at Niagara Falls to account (55 Cong. Rec. 4541). Significantly, the last two joint resolutions were cast in such a form that they and the licenses issued under them would expire on the effective day of

[49] *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, 790 (C. A. 2), certiorari denied, 320 U. S. 792.

[50] January 19, 1917, 39 Stat. 867; June 30, 1917, 40 Stat. 241; June 29, 1918, 40 Stat. 633; July 12, 1919, 41 Stat. 163; cf. R. 457–471 for the texts of the resolutions and of the licenses issued thereunder.

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the legislation controlling the diversion of water from Niagara Falls. Hence, the enactment of the Federal Water Power Act operated as the revocation of the temporary revocable licenses under which respondent was operating,[51] just as the River and Harbor Act of 1909 (35 Stat. 815, 820; Stat. App. 52) [52] terminated the Chandler-Dunbar licenses. As we have shown throughout this brief (cf. pp. 33, 41–43, 47), Congress intended to assert its rights over Niagara Falls to the utmost,[53] leaving no room for the continued existence of any alleged private rights or state grants.[54] And, of course, if respondent's rights were to be disregarded, so would be the rights of its grantees.[55]

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[51] Cf. *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, 790 (C. A. 2), certiorari denied, 320 U. S. 792.

[52] Cf. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 56–57.

[53] See also Learned Hand's holding in *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, 791 (C. A. 2), certiorari denied, 320 U. S. 792, that the congressional debate and the specific references to respondent were "unequivocal assertions that the petitioner's [respondent here] existing rights would not be recognized."

[54] *Supra*, pp. 25–43.

[55] The International Boundary Waters Treaty of 1910 (36 Stat. 2448, 2450), relied upon by the court below (R. 602–603) was, of course, an agreement between the United States and Canada and did not relate to the question as to whether federal or state laws should control the diversions allowed in the United States. Cf. *Niagara Falls Power Co.* v. *Federal Power Commission*, *supra*, at 790.

III

THE FEDERAL POWER COMMISSION PROPERLY DISALLOWED THE PAYMENTS AS ILLEGITIMATE OPERATING EXPENSES

In computing excess earnings the Commission must prevent the inflation of cost. *Alabama Power Co.* v. *McNinch,* 94 F. 2d 601, 618 (C. A. D. C.). Hence, it is not bound by the circumstance that the licensee actually made an expenditure (or failed to collect potential income) but may disregard any cost item which, although incurred, is not of a legitimate nature. *Alabama Power Co.* v. *McNinch, supra; Northern States Power Co.* v. *Federal Power Commission,* 118 F. 2d 141, 143 (C. A. 7); *Alabama Power Company* v. *Federal Power Commission,* 128 F. 2d 280, 291 (C. A. D. C.), certiorari denied, 317 U. S. 652; *Alabama Power Company* v. *Federal Power Commission,* 136 F. 2d 929, 931 (C. A. 5). In the instant case the Commission held that the payment of rentals (or the grant of rebates) for these water power rights does not constitute a legitimate charge against income.

For the reasons we have detailed above, this decision was obviously correct. The short of the matter is that private water power rights were not preserved by the Act. Further, the payments here in question are for water rights in the Niagara River which Congress expressly refused to confirm. Even under New York law, their valid-

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ity is extremely doubtful. Accordingly, even if it were to be held that the Federal Water Power Act of 1920 did not abolish "vested" water power rights, the rights in question still could not stand, for the purposes of the Act. The Commission acted well within its statutory authority in disallowing the payments in question.

Moreover, even assuming that the rights had validity for some purposes, they retained no assessable value against the Federal Power Commission and the Federal Government.[56] That the respondent might have been under a legal obligation to make payments to the third party (and for the reasons discussed, we think there is no such obligation) does not make it mandatory for the Commission to recognize the expense as a "legitimate one" within the meaning of the Act. There need be no symmetry of legal relations between a regulatory body and its licensee on the one hand, and the licensee and third persons on the other. That a licensee who complies with an order of a regulatory body may thereby incur a legal liability to a third party, does not render the order of the agency less valid. *Board of Regents* v. *Carroll,* 338 U. S. 586, 601–603.

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[56] See *Appalachian Power* (311 U. S. at 427):

"It has been shown * * * that there is no private property in the flow of the stream. *This has no assessable value* to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined for fast land; nothing for the water power." [Italics added.]

In fact, this Court, in *Grand River Dam Authority* v. *Grand-Hydro,* 335 U. S. 359, dealing with the power-site value of land condemned under State law, expressly pointed out the difference in the relationships between, on the one hand, private parties, and, on the other hand, between the United States or its licensee and a private party. See 335 U. S. at 373. Accordingly, it is our position that no matter what the legal incidents of the contracts as between respondent and International Paper and Buffalo Niagara might be, those transactions are not effective as against the United States and the Federal Power Commission.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the order of the Commission be affirmed without modification.

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